

D.T.E. 01-37

Rulemaking by the Department of Telecommunications and Energy on its own motion to promulgate 220 C.M.R. §§ 151.00 et seq.: Rail Fixed Guideway System of the Massachusetts Bay Transportation Authority

### ORDER ADOPTING EMERGENCY REGULATION

#### I. INTRODUCTION

By this Order, and pursuant to G.L. c. 30A, § 2, the Department of Telecommunications and Energy ("Department") adopts as emergency regulations 220 C.M.R. §§ 151.00 et seq.: Rail Fixed Guideway System: Safety System Program Standard. The Department originally promulgated 220 C.M.R. §§ 151.08 and 151.09 in November 1998.<sup>(1)</sup> These two sections were inadvertently omitted from final publication in the Massachusetts Register in a subsequent Department rulemaking revising 220 C.M.R. §§ 151.00 et seq. This rulemaking is intended to reinstate sections 151.08 and 151.09. A final Order must be issued within 90 days after an opportunity to comment pursuant to G.L. c. 30A, § 2. The emergency regulations are designated as 220 C.M.R. §§ 151.00 et seq. and are effective upon filing with the Secretary of the Commonwealth.

#### II. HISTORY OF THE PROCEEDING

The Commonwealth of Massachusetts has one rail fixed guideway system, operated by the Massachusetts Bay Transportation Authority ("MBTA"). The Department exercises oversight of the safety of equipment and operations of the MBTA pursuant to G.L. c. 161A, § 3(i).<sup>(2)</sup> In the discharge of this responsibility and in compliance with Federal

Transit Administration ("FTA") requirements, the Department promulgated 220 C.M.R. §§ 151.00 et seq., the System Safety Program Standard ("SSPS"), consisting of regulations for hazardous conditions safety, personal security oversight, and track inspection and maintenance. See D.P.U. 96-116 (1997), D.T.E. 98-11 (1998), D.T.E. 98-75. The SSPS establishes the criteria the MBTA<sup>(3)</sup> uses to create a System Safety Program Plan ("SSPP").

In 1998, the Department originally promulgated 220 C.M.R. § 151.08, Track Inspection, and 220 C.M.R. § 151.09, Track Maintenance. See D.T.E. 98-75. The new regulations were published with the existing sections as 220 C.M.R. §§ 151.00 et seq. in Massachusetts Register No. 857 on November 27, 1998. In March 2000, the FTA audited the Department's SSPP and directed the Department to make certain improvements to comply with the requirements of 49 C.F.R. Part 659.7. The Department opened a rulemaking proceeding to amend 220 C.M.R. §§ 151.00 et seq. An Order promulgating the amended regulations was issued, and the amended regulations were published in Massachusetts Register No. 903 on September 1, 2000. See D.T.E. 00-38 (2000). As an oversight, the amended regulations, as published, did not contain sections 151.08 and 151.09. To correct this oversight, the Department proposes in this proceeding to immediately reinstate sections 151.08 and 151.09 as emergency regulations and proceed with a rulemaking to make permanent 220 C.M.R. §§ 151.00 et seq., including sections 151.08 and 151.09.

### III. ANALYSIS

The text of the proposed regulations is identical to the text of 220 C.M.R. §§ 151.08 and 151.09, as originally promulgated in D.T.E. 98-75. The Department does not propose in this rulemaking to amend or revise 220 C.M.R. §§ 151.00 et seq., other than to correct an earlier oversight and to reinstate sections 151.08 and 151.09. The need to move with dispatch to reinstate these MBTA safety regulations necessitates resort to the emergency regulation provision of the Administrative Procedure Act. G.L. c. 30A, § 2. Further action will be required to permanently reinstate the regulations, including an opportunity for public comment. A later public hearing and Department Order will provide that opportunity.

The Department's authority to adopt emergency regulations is clear. The Department's regulations provide that upon a finding that "the immediate adoption of a regulation is necessary for the public health, safety or general welfare, and that observance of requirements of notice and public hearing would be contrary to the public interest," the Department may dispense with such requirements and adopt emergency regulations. 220 C.M.R. § 2.05(4); see also G.L. c. 30A, § 2.

The Department further finds that delay in re-implementation of these regulations caused by the requirements of notice and public comment would be detrimental to public safety. When they were originally promulgated in 1998, sections 151.08 and 151.09 were found to be in the public interest, as they provide appropriate standards to implement the safety oversight mandated by FTA regulations at 40 C.F.R. 659. D.T.E. 98-75, at 3. Sections

151.08 and 151.09 continue to be in the public interest. Accordingly, the Department adopts as emergency regulations 220 C.M.R. §§ 151.00 et seq., entitled Rail Fixed Guideway System: Safety System Program Standard. These regulations are effective for 90 days upon filing with the Secretary of the Commonwealth, during which time the Department will proceed with a rulemaking to make the regulations permanent.

#### IV. ORDER

Accordingly, it is

ORDERED: That the regulations attached hereto and designated at 220 C.M.R. §§ 151.00 et seq. are necessary for the public health, safety or general welfare within the meaning of G.L. c. 30A, § 2.; and it is

FURTHER ORDERED: That the regulations entitled "Rail Fixed Guideway System: Safety System Program Standard" attached hereto are hereby ADOPTED; and it is

FURTHER ORDERED: That these regulations shall take effect upon filing with the Secretary of the Commonwealth.

By Order of the Department,

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James Connelly, Chairman

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr. Commissioner

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Deirdre K. Manning, Commissioner

1. Investigation by the Department of Telecommunications and Energy on its own motion to promulgate 220 C.M.R. § 151.08: Rail Fixed Guideway System: Track Inspection and 220 C.M.R. § 151.09: Rail Fixed Guideway System: Track Maintenance, for the Massachusetts Bay Transportation Authority, D.T.E. 98-75 (1998).

2. The Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102-240, codified at 49 U.S.C. 5330 (1994) through the promulgation of Federal Transit Administration regulations at 40 C.F.R. 659: Rail Fixed Guideway Systems: State Safety Oversight, requires states that operate a rail fixed guideway system that is not regulated by the Federal Railroad Administration ("FRA") to designate a state agency to be responsible for overseeing the rail fixed guideway system's safety plan.

3. 220 C.M.R. §§ 150.00 et seq., Railroad Safety Regulations, is applicable to each railroad company operating within the Commonwealth. 220 C.M.R. §§ 151.00 et seq. contains regulations specifically applicable to the MBTA.